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No. 83-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD ARNOLD, IV AND FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR EASTERN AIR LINES, INC.

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QUESTIONS PRESENTED

The first question framed by petitioners in fact presents two questions, both of which would need to be decided if petitioners were to prevail.

1. When a circuit judge shifts to senior status before the court of appeals takes action on a pending suggestion for rehearing en banc, is that judge to be counted in determining whether a "majority of the circuit judges . . . who are in regular active service" have "ordered" rehearing en banc pursuant to 28 U.S.C. § 46(c).

2. In determining whether a "majority of the circuit judges . . . in regular active service" have ordered rehearing en banc pursuant to 28 U.S.C. § 46(c), may the court of appeals decline to count a recused judge who is barred from voting on the suggestion for rehearing.

Petitioners' second question is ambiguously and broadly framed and may be recast as follows:

3. Did five members of the court of appeals abuse their discretion in voting to rehear the split decision of a panel when the dissenting member of the panel found that "egregiously unprofessional" misconduct of counsel for petitioners and the United States resulted in substantial injustice to respondent and affirmance of the district court's judgments would invite similar misconduct by other members of the bar.

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BRIEF IN OPPOSITION FOR EASTERN AIR LINES, INC.

Respondent Eastern Air Lines, Inc., requests the Court to deny the petition for writ of certiorari, seeking review of the Fourth Circuit's en banc judgment in this case. The en banc opinions of the Fourth Circuit are now reported at 712 F.2d 899.

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 455 provides in pertinent part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceed-

ing in which his impartiality might reasonably be questioned.

* * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation. . . ."

* * * *

28 U.S.C. § 2071:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 47, Federal Rules of Appellate Procedure:

"Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Court."

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners' statement of the case fails to discuss the opinions below and the order entered on December 23, 1982. We summarize the order and opinions here because they (1) demonstrate the soundness of the court of appeals' ruling on the first issue presented by petitioners and (2) set forth an independent ground for affirming the judgment below.

The original panel of the court of appeals affirmed two judgments for petitioners by a vote of two to one. On

June 16, 1982, respondent Eastern Air Lines filed a timely suggestion for rehearing en banc that was provisionally granted on December 23. The order granting rehearing requested the parties to brief the question whether rehearing en banc had been authorized by a "majority" of the judges in regular active service (Pet. App. 2e). The question arose because ten judges are authorized to sit on the Fourth Circuit; five judges had voted to rehear; four judges had voted to deny rehearing; one of the four judges voting to deny (Butzner, J.) had cast his vote while on regular active service but took senior status almost two months before the suggestion for rehearing was acted on; and one judge (Ervin, J.) had recused himself (Pet. App. 2e, 21f).[1] After the "majority" issue was fully briefed and the entire case was reargued, the en banc court ruled by a vote of six to two that "a majority of the circuit judges who are in regular active service" had voted for rehearing (Pet. App. 2f).[2]

1. *The Majority Opinion.* The majority opinion "purposely" avoided deciding whether Judge Butzner's shift to senior status, before rehearing en banc was ordered by the court, reduced the number of judges "in regular ac-

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[1] The court of appeals' order suggested that the parties consider related decisions and authorities including *Zahn* v. *Int'l Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd on other grounds*, 414 U.S. 291 (1973); and *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963). (Pet. App. 2e.)

[2] Nine judges sat during reargument en banc. One judge, Bryan, J., was a senior judge who had participated as a member of the original panel. He voted on the merits of the appeals. He did not vote on the question of whether the "majority" requirement of Section 46(c) had been met because senior circuit judges are barred from voting on suggestions for rehearing en banc (Pet. App. 2f). Judge Butzner, who initially voted against rehearing, did not sit on the en banc court because he had taken senior status. See 28 U.S.C. § 46(c).

All nine of the assembled judges voted on the merits, and five of those judges concluded that the judgments of the district court should be reversed.

tive service" from ten to nine (Pet. App. 4f). Instead, the court found that only five votes were needed for a "majority" because the recused, non-voting judge (Ervin, J.) should not be counted as a judge in regular active service in this particular case (Pet. App. 7f).

The court pointed out that the second sentence of 28 U.S.C. § 46(c) provides that "[a] court in banc *shall* consist of *all* circuit judges in regular active service" (emphasis added). If a recused judge were encompassed in the phrase "judges in regular active service," that would mean that he should sit on the en banc court notwithstanding his recusal. Such a reading of Section 46(c) would defeat the purpose of 28 U.S.C. § 455, which provides: "Any . . . Judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." Hence, the majority opinion concluded that the phrase "judges in regular active service," found in the second sentence of Section 46(c), was not intended to include recused judges. Such judges, by statutory mandate, are "out of service" in cases where they must recuse themselves. (Pet. App. 6f-7f.)

This phrase—judges "in regular active service"—also appears in the first sentence of Section 46(c), which specifies that rehearing en banc may be ordered by a "majority" of judges "in regular active service." The court below concluded that this phrase should have the same meaning in both sentences of Section 46(c) and thus a recused judge should not be counted in determining whether a majority of judges "in regular active service" has ordered rehearing en banc. (Pet. App. 7f.)

The court of appeals found that its reading of Section 46(c) was buttressed by the ordinary understanding of the term "majority" as defined in H. Robert, *Robert's Rules of Order* 339 (Section 43) (S. Robert ed. 1970): "[I]t means more than half of the votes cast by persons legally entitled to vote, *excluding blanks or abstentions*,

at a regular or properly called meeting at which a quorum is present" (emphasis added). (See Pet. App. 9f-10f.)[3]

2. *The Concurring Opinion.* Judge Hall agreed with the majority's rationale and added a "more narrow and equally compelling" ground for holding that the en banc court was properly convened (Pet. App. 21f). He noted that Judge Butzner took senior status 52 days before the court acted on the suggestion for rehearing en banc. Thus, there were fewer than 10 judges "in regular active service" when rehearing was "ordered" by the court, and five of those judges had voted to rehear. Relying on *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688-89 (1960), Judge Hall concluded that it was irrelevant that Judge Butzner had cast a vote to deny rehearing while he was still in regular active service because the validity of a vote to grant or deny rehearing must be determined on the date that the court enters its order acting on the suggestion for rehearing. (Pet. App. 22f.)[4]

3. *The Concurring and Dissenting Opinion.* Judge Widener, joined by Judge Phillips, concluded that the five votes to rehear did not "consitute a majority of ten" (Pet. App. 14f). This opinion implicitly counts Judge Butzner as a judge in regular active service but does not expressly deal with Judge Butzner's shift to senior status. As to the recusal issue, Judge Widener said that "the *Shenker* case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does and it did not do so . . ." (Pet. App. 16f). He noted that a

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[3] The majority opinion also observes that "we do not, by our decision today preclude a possible change in practice, brought about by adoption [by us] of a rule of general applicability" (Pet. App. 4f).

[4] Judge Hall also pointed out that the Fourth Circuit, sitting en banc, did not tally Judge Craven's vote concurring in a draft opinion when Judge Craven died before the court's decision was announced. *Mayor & City Council of Baltimore* v. *Matthews*, 571 F.2d 1273 (4th Cir.), *cert. denied*, 439 U.S. 862 (1978).

majority of other circuits count recused judges, and endorsed their position because it would help to limit the number of en banc proceedings and would help to ensure "'uniformity and continuity'" in the decisions of the court (Pet. App. 18f).

REASONS FOR DENYING THE WRIT

I. PETITIONERS' FIRST QUESTION

A. Two Decisions Of This Court Provide An Independent Basis For Affirming The Judgment Below Even If Petitioners Were To Prevail On The Question They Present.

To establish that five votes to rehear did not constitute a "majority" of the judges in "regular active service," petitioners must show (1) that a recused judge must be counted as a "judge in regular active service" and (2) that Judge Butzner must be counted even though he was not "in regular active service" when the suggestion for rehearing en banc was acted on by the court of appeals.[5] Two decisions of this Court, however, make clear that Judge Butzner's vote to deny rehearing should not be counted. Thus, there is a well-established, independent ground for affirming the judgment below that renders petitioners' first question a futile exercise, unnecessary to the proper resolution of this case.

Moody v. *Albemarle Paper Co.*, 417 U.S. 622 (1974), holds that Section 46(c) bars senior judges from voting

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[5] Petitioners do not contend that vacancies should be counted. The dissenting opinion below, which in other respects supports petitioners, notes that "vacant judgeships" do not count "one way or the other" (Pet. App. 16f n.2). The First Circuit, moreover, has held that a "vacancy" is not "a judge in regular active service" within the meaning of Section 46(c). Thus, where four judgeships were authorized, but one was vacant, a vote of two to one constituted a majority of the judges in regular active service. *United States* v. *Martorano*, 620 F.2d 912 (1st Cir. 1980) (en banc), *cert. denied*, 449 U.S. 952 (1980).

on suggestions to rehear en banc. *United States* v. *American-Foreign Steamship Corp., supra*, 363 U.S. 685, holds that when senior judges are not competent to rule on a matter, the status of a participating judge is determined at the time that the court of appeals' decision is entered and not at some earlier stage when the judge was still in regular active service. In *American-Foreign Steamship*, the Second Circuit ordered rehearing en banc and fresh briefs. Judge Medina took senior status after the case was submitted to the Second Circuit sitting en banc, but before it was decided by the en banc court. He continued to participate in the case while on senior status. This Court held that Section 46(c) requires that en banc cases be "determined" by judges in regular active service, and such a case is "determined" only when the decision is issued, not when the case is argued, or when it is submitted on brief, or when some other interim step is taken. 363 U.S. at 688, 690. Because Judge Medina was on senior status when the case was "determined," his vote could not be counted. By the same token, in this case rehearing en banc was "ordered," within the meaning of Section 46(c), on the date that the order was issued (December 23, 1982), and by then Judge Butzner had been in senior service for 52 days. Accordingly, his vote should not be counted.

The result reached in *American-Foreign Steamship* is sound. Initial votes should not be treated as final votes so long as a matter continues to pend. During that time a judge should be free to consider the views of other members of the court and to reconsider his own position. This Court, we understand, treats all of its decisions as tentative and subject to reconsideration by any justice until the moment that the Chief Justice releases the decision. Barrett McGurn, "Public Information, The United States Supreme Court," 69 A.B.A.J. 40, 45 (1983). In the case of circuit judges who shift from regular status to senior status, there is even less reason to freeze their

initial votes when a suggestion for rehearing continues to pend beyond their retirement date. Senior judges are ordinarily barred from participating in any later en banc proceeding, see 28 U.S.C. § 46(c); thus their votes should not impose an en banc proceeding on regular active judges who are evenly split, or foreclose an en banc proceeding sought by a majority of the judges who remain in regular active service.[6]

In short, if certiorari were granted, the recusal issue presented by petitioners would likely be mooted because there are two decisions of this Court that support affirmance on a different ground.

B. The "Conflict" Among The Circuits Represents A Permissible Difference Among The Courts Of Appeals On A Matter Of Internal Governance.

Petitioners contend that the decision below is in direct conflict with the Sixth Circuit's decision in *Clark* v. *American Broadcasting Co.*, 684 F.2d 1208, *cert. denied*, 103 S.Ct. 1433 (No. 82-1288) (March 21, 1982) (Pet. 10). In *Clark*, the Sixth Circuit counted a recused judge in determining whether a majority of the court had voted to rehear; in this case the Fourth Circuit did not count the recused judge in making that determination.[7] The

[6] Additional problems are invited if a court of appeals counts votes of judges who shift to senior status before a suggestion for rehearing en banc is acted on by the court. If, for example, the vacancy created by the retirement of a judge is filled while the suggestion for rehearing is pending, the new judge is plainly a "judge in regular active service" and is eligible to vote on the suggestion.

[7] In *Clark*, the American Broadcasting Company (ABC) was denied rehearing en banc by a vote of five for, four against, and one recused. ABC did not ask the Sixth Circuit to reconsider that denial on the ground that the recused judge should not be counted. (Respondent's Brief in Opposition, No. 82-1288, p. 1.) Instead it raised the issue in this Court by a petition for certiorari that was denied. Now ABC has petitioned this Court for a writ of mandamus to correct the judgment of the Sixth Circuit in light of the Fourth

rules, internal operating procedures and orders of other courts of appeals reflect similar variations in counting or not counting recused judges.[8]

Petitioners recognize that the issue they present raises a question of discretion, but they assert that "[s]urely the discretion vested in the circuits to determine for themselves the format for the exercise of the *en banc* power is not so broad as to permit such diametrically opposed interpretations of § 46(c) to co-exist in a unitary system of federal justice" (Pet. 13). In assessing this issue, it is important for the Court to distinguish between

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Circuit's ruling in this case. (No. 83-575.) ABC still has not afforded the Sixth Circuit the opportunity to reconsider its ruling in light of this case, and thus the conflict may be largely due to ABC's repeated efforts to have this Court decide the issue in the first instance.

[8] At least four circuits decline to count recused judges in determining if a majority has voted to rehear: *Fourth Circuit*, policy established in the instant case; *Seventh Circuit*, "Statement of Internal Operating Procedures," § 5(d)(1); *Eighth Circuit*, Rule 16(a) of its rules; and *Ninth Circuit*, "Internal Operating Procedures," § II.K.(2)(d). It should be noted that the Seventh Circuit recently changed its position to accord with the Fourth Circuit. Compare *Porter Chapter of Izaak Walton League* v. *Atomic Energy Commission*, 515 F.2d 513, 533 (7th Cir.), *rev'd on other grounds*, 423 U.S. 12 (1975), with "Statement of Internal Operating Procedures," § 5(d)(1): "A simple majority of the voting active judges is required to grant a rehearing in banc."

At least four circuits count recused judges in determining whether a majority has voted to rehear: *District of Columbia Circuit*, "Handbook of Practice and Internal Procedures," p. 73 (1978); *Second Circuit*, *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1040, *aff'd on other grounds*, 414 U.S. 291 (1973); *Third Circuit*, *Curtiss-Wright Corp.* v. *General Electric Co.*, 599 F.2d 1259, 1265 (1979), *rev'd on other grounds*, 446 U.S. 1 (1980); and *Sixth Circuit*, *Clark* v. *American Broadcasting*, *supra*.

It appears that five circuits either have not faced the recusal issue or have not indicated their position in published opinions or manuals of internal operating procedures. Those circuits are the First, Fifth, Tenth, Eleventh, and Federal Circuits.

the rights secured to litigants by Section 46(c) and the discretionary power conferred on courts of appeals by that section.

This Court has twice held that Section 46(c) creates only two rights for a litigant—"the right to know the administrative machinery that will be followed [in deciding whether to grant rehearing] and the right to suggest that the *en banc* procedure be set in motion in his case." *Shenker* v. *Baltimore & Ohio Railroad*, 374 U.S. 1, 5 (1963); *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247, 250 (1953).[9] Neither of these rights is implicated in the "conflict" between the Sixth Circuit and the Fourth Circuit. Neither Circuit has failed to advise litigants of the means whereby a majority may order rehearing en banc or failed to provide the litigant with the opportunity to suggest rehearing. See *Moody*, *supra*, 417 U.S. at 625 n.3 and Fed. R. App. P. 35(b). Indeed, the petitioners do not contend that the court of appeals has improperly restricted their right to suggest rehearing; on the contrary, they complain that the court below has been too generous in granting rehearing en banc (Pet. 17-18). Thus, there is no reason for the Court to review this case in order to protect the litigants' rights under Section 46(c); their rights under that statute have already been clearly defined by this Court, and there is no conflict among the circuits respecting those rights.

The conflict that petitioners urge this Court to resolve —whether a court may decline to count a recused judge in determining whether a majority of the court favors rehearing—is a matter of internal governance, left to the discretion of each court of appeals. *Cf. Shenker*, *supra*,

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[9] In *Western Pacific*, this Court said that "§ 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further." 345 U.S. at 250.

374 U.S. at 5. In enacting Section 46(c), Congress did not undertake to prescribe special rules for determining if the "majority" requirement of Section 46(c) is met when, for example, a circuit judge is disqualified, voluntarily abstains though present, or fails to vote because the judge is temporarily ill, on vacation, or sitting by designation in another court.[10] The individual courts of appeals were left to work out such nuances.[11] "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Western Pac., supra*, 345 U.S. at 259. "[T]he statute does not compel the court to adopt any particular procedure governing the exercise of the [en banc] power. . . ." *Id.* at 267. "A court may take steps to use the *en banc* power sparingly. . . ." *Id.* at 261. Thus, the "conflict" among the circuits that petitioners decry is a permissible "conflict" among the courts of appeals reflecting the "independence within the area of their authority." *Western Pac.*, 345 U.S. 247, 268-69 (Opinion of Frankfurter, J.). Such a conflict plainly does not warrant review by this Court.

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[10] In Section 46(d) Congress has defined a quorum for en banc review as a majority of "the number of judges authorized to constitute a court." The quorum requirement thus sets the outer acceptable limits on rehearings en banc when a substantial number of judges are recused or otherwise prevented from participating in an en banc proceeding. Congress has also provided that senior judges may not vote on suggestions for rehearing en banc by providing that rehearing en banc may be ordered only by judges "in regular active service." 28 U.S.C. 46(c). Congress has not required that in other respects the en banc practices of the courts of appeals shall be uniform. In this regard, we note that each circuit is authorized to "make and amend rules governing its practice" unless those rules are inconsistent with the Federal Rules of Appellate Procedure or Acts of Congress. Rule 47 Fed. R. App. P.; 28 U.S.C. § 2071.

[11] The special committee that drafted Section 46(c) "assimilated the power to sit *en banc* to discharge . . . of housekeeping functions" such as appointing clerks and fixing the times when court shall be held. *Western Pac., supra*, 345 U.S. at 256.

In any event, the "conflict" cited by petitioners seems to be more the result of inadvertence than deliberate decision, and it may be worked out in the future. The decision below appears to be the first one in which a court of appeals, following briefing, has written opinions explaining why recused judges should or should not be counted in determining whether a "majority" of judges in "regular active service" favor rehearing en banc. The only other opinion of which we are aware supporting a result contrary to that reached below is the concurring opinion of Judge Mansfield in *Zahn* v. *International Paper Co.*, *supra*, 469 F.2d at 1041, but as the majority below pointed out, Judge Mansfield's opinion did "not allude to the language of the second sentence in § 46(c) or to the problems of directly conflicting meanings assigned to the same language, appearing cheek by jowl in adjacent sentences in a single statute" (Pet. App. 8f). Now that the court below has pointed out these and other problems with including recused judges in the tally, other courts may reasonably be expected to reexamine their positions in light of the Fourth Circuit's decision. Accordingly, even if this were a matter not within the internal governance of the courts of appeals, it would be appropriate for this Court to wait until there is a conflict between reasoned opinions of the courts of appeals, as opposed to a conflict between unexplained orders, internal procedures, and court rules.

C. There Is No Conflict Between The Ruling Below And This Court's Ruling In *Shenker*.

Petitioners state that the ruling below "is arguably in conflict with this Court's holding in *Shenker* v. *Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963)" (Pet. App. 8). As the phrase "arguably in conflict" forebodes, *Shenker* deals with a problem that is conceptually different from the issue presented here. In *Shenker* four judges from the Third Circuit voted to rehear, two voted to deny, and two "abstained." The suggestion for rehearing was deemed

by the Third Circuit to have failed, and this Court affirmed. 374 U.S. at 4-5. Thus, *Shenker* can be read to hold that, in determining whether a "majority" has voted for rehearing, it is *permissible* to count judges who voluntarily abstain from voting. But as the court below pointed out, *Shenker* deals with "abstainers"—*i.e.*, judges who are "voluntary non-voters"; this case deals with a "disqualified judge who is under a binding compulsion not to vote" (Pet. App. 5f n.3). In *Shenker* this Court had no occasion to consider, much less rule on, the effect of recusals required by 28 U.S.C. § 455; thus, that case simply cannot be read to require the courts of appeals to count judges who are ineligible to vote because of an Act of Congress.

Moreover, *Shenker* does not even set forth an unequivocal rule relating to abstentions. In *Shenker* the Court said that under Section 46(c) the Third Circuit was obliged to provide the litigants with "administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. The Court approved the Third Circuit's "practice" of submitting "every petition for rehearing . . . to every member of the court" without requiring each judge "to enter a formal vote on the petition." *Id.* The Court's holding is a narrow one:

> "Such a *procedure* is clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5 (emphasis added).

In short, *Shenker* plainly does not control the issue that the Fourth Circuit decided in this case.

II. PETITIONERS' SECOND QUESTION

The second question presented by petitioners is plainly unworthy of review. Petitioners urge that it was an abuse of discretion for the court of appeals to rehear this

case because the case did not present an intra-circuit conflict or question of exceptional legal importance (Pet. 17-18).

The record presented to the court of appeals revealed a sound reason for the court to convene en banc—namely, to protect the integrity of the fact-finding process in the Fourth Circuit. This case was tried before a jury for the purpose of determining petitioners' damages. At trial, counsel for petitioners and the United States engaged in multiple instances of flagrant misconduct. The nature and extent of that misconduct is set out in Judge Murnaghan's dissent from the panel's opinion (Pet. App. 31d-37d). Notwithstanding the misconduct of counsel, two members of the original panel voted to affirm the judgments; but even they found that counsel's conduct was "improper" and "in substantial part inelegant, tasteless, offensive, arguably violative of professional standards and . . . irresponsibly threating to any verdicts [for their clients]" (Pet. App. 10d).

The dissenting member of the panel concluded that the closing arguments of the Government and petitioners were "egregiously unprofessional" (Pet. App. 37d). He expressed shock that Eastern would be required to pay damages "extracted from the jury through resort to such offensive tactics" (Pet. App. 38d). He was concerned not only with the unfairness of this particular trial but with the ramifications that affirmance would have on the bar at large in the Fourth Circuit, especially personal injury lawyers who were retained on contingent fee contracts (Pet. App. 38d). The prospect of reaping huge damage awards and contingent fees by improper arguments to a jury needed to be held in check by the prospect that such improper conduct would result in a new trial. Affirmance of the judgment for petitioners was, in Judge Murnaghan's view, "an open invitation to outrageous misbehavior by [other] trial lawyers" (Pet. App. 37d). The court of appeals subsequently granted rehearing en banc

and "largely" relied on the "rationale" of the dissenting opinion in reversing the judgments (Pet. App. 10f).[12] Thus, there is no basis for petitioners' notion that the court of appeals abused its discretion "such as to vitiate the judgment rendered by the Circuit Court" (Pet. 3).

Moreover, the issue raised by petitioners' second question is simply not an appropriate one for plenary review by this Court. "[V]oting *whether to rehear* a case in banc . . . is essentially a policy decision of judicial administration." *Moody, supra*, 417 U.S. at 627. No rule or statute was violated by five judges in this case when they decided to vote for rehearing en banc. In tendering their second question, petitioners do not contend that these five judges violated the requirements of 28 U.S.C. § 46(c) or any other statute. They do suggest, to be sure, that granting rehearing was contrary to Rule 35(a), Fed. R. App. P., but that rule merely states that rehearing en banc "ordinarily will not be ordered" unless one of two conditions is met. The use of the word "ordinarily" is explicit recognition that rehearing en banc may be granted in other circumstances.

In the final analysis, the issue of whether to grant rehearing en banc in a given case must rest in the sound judgment of the judges of the courts of appeals. The question of whether a court of appeals should grant rehearing en banc—like the question whether this Court should grant certiorari—is heavily dependent on the nature of the individual case and many other circumstances. At best there can only be general guidelines for selecting those cases warranting rehearing en banc, and the circuit

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[12] As we read the opinions, five judges voted to reverse because of the improper conduct by counsel and the erroneous consolidation of Eastern's case with that of its insurers (Pet. App. 2f, 10f-13f). One member of the majority concluded that the improper conduct was prejudicial, but, standing alone, was not an independent ground for reversal because there were insufficient objections (Pet. App. 13f).

judges' application of the guidelines in a given case is pregnant with the potential for dispute.[13] If this Court were to hold that the Court of Appeals abused its discretion in granting rehearing en banc, numerous other petitioners would claim that the courts of appeals had either improperly granted or denied rehearing en banc in their particular cases. Unless a petitioner can demonstrate that the decision to rehear a case has violated a statute or rule, that decision should be viewed as a matter left to the discretion of the courts of appeals. "For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals," *Shenker, supra*, 374 U.S. at 5.

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[13] Petitioners urge this Court "to provide guidance to the circuit court's concerning the limited proper use of the *en banc* authority and to sanction misuse of that power" (Pet. 23). But there is nothing to demonstrate that the courts of appeals are overutilizing their en banc authority. On the contrary, petitioners' statistics show that, in 1980, less than one percent of all appeals filed (0.28%) were heard en banc (Pet. 17 n.10). As petitioners say, these statistics "illustrate" the "degree to which *en banc* rehearings are disfavored" and "[t]here is now general agreement among the circuits that the 'extraordinary' cases meriting *en banc* treatment are those which involve issues likely to impact upon many other cases. . . ." (Pet. 17 & n.10).

CONCLUSION

Neither question presented by petitioners poses an important issue of law that needs to be resolved by this Court, and accordingly the petition for writ of certiorari should be denied.

Respectfully submitted,

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